No. 87-727

In The
Supreme Court of the United States
October Term, 1987

GENERAL TELEPHONE COMPANY OF CALIFORNIA, LOUISE W. BOWSER, and RICHARD SAYRE,

Petitioners,

vs.

FLOYD RAY ADDY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The decision rendered by the United States District Court of Appeals for the Ninth Circuit which forms the basis for this Petition for Writ of Certiorari, may not be as broadly construed as suggested by the questions presented by Petitioners. Respondent: Floyd Ray Addy, therefore, respectfully submits that the following questions more accurately state the questions before the Supreme Court:

I. **Whether or not the date of disciplinary memorandum which made release from employment contingent on failure to obtain alternative position with the employer, was the appropriate date to calculate the beginning of the statute of limitations.**

   A. Where Notice Of Potential Termination Is Equivocal And Contradicted By Representations Of The Employer The Statute Of Limitations Does Not Begin To Run Until The Termination Date Is Definite And The Discriminatory Conduct Ceases.

   B. Respondent Alleges That Petitioner, General, Did Deliberately Design And Scheme To Mislead Him Or To Lull Him Into Not Asserting His Rights And That Such Conduct By Petitioners Warrants The Tolling Or Waiver Of the Statute of Limitations.

II. **Tolling of the statute of limitations is appropriate where notice of termination is equivocal, confusing and contradicted by oral representations of employer, and supported by employer's willful and misleading actions.**

   A. Tolling Of The Statute Of Limitations Where Plaintiff Has Been Actively Pursuing Remedies Does Not Frustrate The Purpose Of The Statute.

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The Respondent, Floyd Ray Addy, respectfully requests that this Court deny the petition for *writ of certiorari,* seeking review of the Ninth Circuit's opinion in this case. The opinion is reported at 914 F.2d 1311 (1967).

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STATEMENT OF THE CASE

Respondent, Floyd Ray Addy, was hired by General Telephone Company of California (General) on or about April 21, 1972, as a "Technical Illustrator."

From April 21, 1972 through May of 1980, Respondent received satisfactory performance evaluations. On May 7, 1980, Respondent received his first unfavorable evaluation. Upon receipt of same, or shortly thereafter, Respondent advised the EO Department, an internal agency created by General to impartially investigate allegations of discrimination, that his supervisors were attempting to force his retirement at the age of 65. On July 3, 1980, Respondent did formally file an internal complaint with the EO Department. Prior to Respondent filing, the EO representative informed Petitioners, Bowser and Sayre, of his complaint of age discrimination and that they were parties named in the complaint.

On June 17, 1980 and again on June 19, 1980, EO representative, Andy Gonzales, met with Respondent and Petitioners, Bowser and Sayre.

On July 17, 1980, Mr. Gonzales, drafted a memo to Mr. Thompson, informing her that General's Personnel Practices on retirement were out of date.

On December 17, 1980, on Respondent's birthday, Mr. Addy was presented with a disciplinary memorandum from petitioner, dated December 3, 1980, advising him that his performance was subject to review within 90 days; and if he failed to improve he would be reclassified to an available position more commensurate with his skill level and if no vacancy exists he may be released.

On February 23, 1981, Respondent received an offer of "alternative employment" in Petitioner's Telephone Equipment Production Center. Such employment was for substantially lower pay and consisted of assembling and testing telephone equipment for which respondent had no knowledge or training. Respondent, subsequently heard Petitioner, Sayre, discussing another job opening and his abilities for said position with an unknown third party.

On March 16, 1981, Respondent filed age discrimination charges with the Department of Fair Employment and Housing (DFEH), and by deferral with the Equal Employment Opportunities Commission (EEOC).

On March 20, 1981, Respondent was informed, through a disciplinary memorandum, that he had until April 20, 1981 to obtain another position with the company or be released.

On April 17, 1981, Respondent placed his tools in boxes and returned for same on August 20, 1981.

Throughout his grievance and subsequent investigation by the EO, Respondent was continually assured by the EO that he would be given another position with General and that he should not worry.

On or about April 20, 1981, Respondent was terminated from General, at said time Respondent was the oldest employee in his Department.

On or about July 21, 1982, after attempts at conciliation failed, DFEH issued him a right to sue letter. On June 13, 1983, Respondent was notified by EEOC that his case was being closed and that he could pursue his legal remedies.

On October 20, 1982, Respondent filed suit in Superior Court for the County of Los Angeles.

On April 16, 1984, Respondent filed suit in Federal District Court alleging violations of 29 U.S.C. § 621, *et seq.*, for age discrimination and retaliatory discharge.

On October 9, 1984, Petitioners filed a Motion to Dismiss and a Motion to Strike. The motion to dismiss was denied, the court having found the existence of continuing violations, but granted in part portions of petitioners request to strike.

On May 15, 1985, pursuant to stipulation, Respondent amended his Federal Complaint alleging his pendent state claims.

On September 23, 1985, the District Court, granted Petitioner a Motion for Summary Judgment, dismissing respondent's case, due to lack of subject matter jurisdiction, as the statute of limitations had run. On October 2, 1985, Respondent filed an appeal to the U.S. Court of Appeals for the Ninth Circuit. Said court reversed and remanded.

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REASONS WHY THE PETITION SHOULD BE DENIED

I. WHETHER OR NOT THE DATE OF DISCIPLINARY MEMORANDUM WHICH MADE RELEASE FROM EMPLOYMENT CONTINGENT ON FAILURE TO OBTAIN ALTERNATE POSITION WITH THE EMPLOYER, WAS THE APPROPRIATE DATE TO CALCULATE THE BEGINNING OF STATUTE OF LIMITATIONS.

A. Where notice of potential termination is equivocal and contradicted by representations of the employer, the statute of limitations does not begin to run until the termination date is definite and the discriminatory conduct ceases.

According to *Delaware State College v. Ricks*, 449 U.S. 250 (1980), the proper date upon which the statute of limitations begins to run is the date of definite notice of termination, not the date the termination takes effect. Subsequent decisions have focused on the date when DEFINITE notice of an EXACT date of termination was known by the employee or should have been known by an employee reasonably diligent in protecting his rights. In each case the employer unequivocally informed the employee of their final decision to terminate the employment relationship in the notice. Courts have emphasized that such notice must be clear and unequivocal. *Chardon v. Fernandez*, 454 U.S. 6 (1981); *Miller v. International Telephone and Telegraph Corp.*, 755 F.2d 20, 23 (2d Cir. 1985); *Monnig v. Kennecott Corp.*, 603 F.Supp. 1035 (D. Conn. 1985).

On his 65th birthday, December 17, 1980, Floyd Ray Addy was issued a disciplinary memorandum, which informed him of alleged deficiencies in his work and attitude. The notice ended with the following caveat:

> "During the last five months we feel that adequate guidance and direction has been given, yet no substantial improvement has been made. In an effort to give you every opportunity to bring your performance up to the expected level, we will review your performance in 90 days. If adequate improvement is not made in the areas of quality, quantity and other work related requirements, you will be reclassified to an available position more commensurate with your skill level. If no vacancy exists, you may be released." (CR 40, TAB CR 40A, subtab 24, Pg. 781).

Addy received a second discipline memorandum, dated March 20, 1981, stating:

> "Your work has not shown adequate improvement in those work related areas as discussed in the December 17 memorandum. You still do not meet the accepted standards of performance for a Design Artist II and you have refused an opportunity for employment in another classification. Therefore, you are given until April 20, 1981 to find a position within the company for which you may be qualified. If you fail to find placement by that time, you will be released from employment with General Telephone Company." (CR 35 pp. 155, 156, CR 40A, subtab 25, pg. 783).

Respondent contends that these disciplinary notices were not sufficient to be considered final notices but were made contingent upon his failing to obtain another position with the company. The Court in *Verschuuren v. Equitable Life Assurance Society of U.S.*, 554 F.Supp. 701 (S.D.N.Y., 1983) stated that in order for *Delaware*

State College v. Ricks, 449 U.S. 250, 101 S.Ct. 498, 66 L. Ed.2d 431 (1980) to control a notice of termination shall be considered the controlling date for determining when plaintiff's cause of action arose and not at the time his employment ultimately ceased, only where such notice of dismissal is clear, and unequivocable. The court held:

> "This letter, is, at best, equivocal, it does not assert that plaintiff will be dismissed; it states only that he will be dismissed unless another position for him becomes available, and that every reasonable effort will be made to find him another position. Accordingly, the letter is of an entirely different character than the notice in *Ricks,* as to which the Supreme Court stated that there was no suggestion that was in any respect tentative. *Ricks, supra,* 449 U.S. at 261, 101 S.Ct. at 506. This is true also for the notice in *Chardon v. Fernandez,* 454 U.S. 6, 102 S.Ct. 28, 70 L.Ed.2d 6 (1981), a Supreme Court case following *Ricks,* in which the court stated that respondents were notified . . . that a final decision had been made to terminate their appointments." See also, *Pfister v. Allied Corp.,* 539 F.Supp. 224, 227 (S.D.N.Y. 1982).

Respondent therefore contends that both notices he received from petitioner General, were contingent upon another position in existence, and at the very least, final notice would have occurred on his last day of employment.

B. Respondent alleges that petitioner, General, did deliberately design and scheme to mislead him or to lull him into not asserting his rights and that such conduct by petitioners warrants the tolling or waiver of the statute of limitations.

Where a willful violation of ADEA is found, a three-year limitation period is available under 29 U.S.C. § 255(a).

Respondent maintains that he was actively misled by his employer and the company Equal Opportunity Department (EO). Respondent contends that the EO was established by the employer to handle disputes/claims of employees, including those of discrimination. Respondent filed a complaint with the company's EO, in a good faith attempt to resolve the dispute between he and his employer. Respondent believed that by filing said complaint he would be afforded an impartial and equitable forum which would investigate his grievance and render a fair and amiable resolution. With said belief, Respondent cooperated with the EO providing them with documentation and witnesses who would support his contentions. He was assured by the EO that his documentation and witnesses would be kept in confidence. Throughout his grievance/dispute the EO actively provided him with reassurances that his claim was being pursued objectively and confidentially. Yet after his termination, by way of formal discovery, the respondent was supplied documentation that clearly indicated that the EO was actively working with Petitioner to terminate him. (CR 40A, p.749-788, Tab 24).

Further, Respondent was never advised by any person who had the authority to terminate him to leave his employment with the company. His supervisor, Ms. Bowser, on April 15, 1981, did scream at respondent, "If you don't get your stuff packed, I'll pack it for you.", presumably out of her department, but Ms. Bowser was without authority on her own to terminate him. Her statement was fully negated by the EO's assurances that a position would be found for him within the company. (CR 40, Tab CR 40A, subtab 38, p. 848; CR 40, Tab CR 40A, subtab 40, p. 857).

Respondent agrees with petitioners in their reference to *Price v. Litton Business Systems, Inc.*, 694 F.2d 963 (4th Cir. 1982) on page 13 of their petition, specifically, "An employee's hope for rehire, transfer, promotion, or a continuing employment relationship—which is all that Price asserts here—cannot toll the statute absent some employer conduct likely to mislead an employee into sleeping on his rights." Respondent contends that such conduct is clearly evident in this case. Although Respondent was advised in the March 20th disciplinary memo, that his position in the drafting department would be foreclosed, final dismissal from the company was not evident to Addy up to and even after April 21, 1981 because of promises made by the company representative that an alternate task assignment would be made.

While other cases have found unsubstantiated hopes for continued employment would not avoid a definite termination date, Respondent distinguishes the case at bar from them because of the deliberate and ongoing representations of possible alternative employment within the company which did mislead him into a false understanding that his employment would be continuing in some capacity. See *Boyd v. U.S. Postal Service*, 752 F.2d 410, 414 (9th Cir. 1985); *Aronson v. Crown Zellerbach*, 662 F.2d 589, 595 (9th Cir. 1981), *cert. den.*, 459 U.S. 1200 (1983); also *Cooper v. Bell*, 628 F.2d 1208, 1214 (9th Cir. 1980).

Further, Respondent maintains that the notices were deliberately drafted and re-drafted by the company and the EO officer in order to lull plaintiff into complacency. The standard for willfulness established by *Trans World Airlines Inc. v. Thurston*, 469 U.S. 111 (1985) is that a violation is willful if the employer either knew or showed

reckless disregard for the matter of whether its conduct was prohibited by ADEA.

The two notices received by Respondent included virtually the same language: the December notice stated, " . . . you may be released if you do not improve"; the March notice stated " . . . you will be released unless you find employment within the company." After the first notice, one alternate position was offered to Respondent. He did not accept or refuse this position under the advice of an EEOC officer handling his case. The officer directed Addy to obtain, in writing, a statement of why he was considered qualified for the position. The company did not respond to his request but instead assumed that his conditional nonacceptance of this job was a refusal. Respondent had no reason to believe additional positions would not be offered to him in light of the EO officer's ongoing assurances that they were still seeking a position commensurate with his qualifications. Further, Respondent's evidence shows that ongoing searches were actually being made on his behalf by the company. Petitioner does not rebut these facts.

The Ninth Circuit did not ignore undisputed facts but found substantial evidence[1] supporting Respondent's contentions that Petitioners conduct and intent were designed to pacify the Respondent into failing to assert his rights. To grant summary judgment where evidence of employer misrepresentations exist would allow employers to give employees vaguely worded termination notices with contrary oral representations intended to lull potential plaintiffs into a false sense of security until they no longer have a remedy thereby thwarting the ADEA statute.

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[1] Three volumes of supporting documentation, approximately 875 pages, accompanied both plaintiff's appellate brief to the Ninth Circuit and their response to defendants motion for summary judgment in the District Court.

II. TOLLING OF THE STATUTE OF LIMITATIONS IS APPROPRIATE WHERE NOTICE OF TERMINATION IS EQUIVOCAL, CONFUSING AND CONTRADICTED BY ORAL REPRESENTATIONS OF EMPLOYER, AND SUPPORTED BY EMPLOYER'S WILLFUL AND MISLEADING ACTIONS.

A. Tolling of the statute of limitations where plaintiff has been actively pursuing remedies does not frustrate the purpose of the statute.

The purpose of a statute of limitations is to put potential defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights, see *Delaware State College v. Ricks*, 449 U.S. 250 (1980). By receiving timely notice, the defendant will be aware of the need to preserve evidence and witnesses respecting the claims.

"Under certain circumstances tolling of this statute may become necessary. Holding compliance with the filing period to be not a jurisdictional prerequisite to filing a Title VII suit, but a requirement subject to waiver as well as tolling when equity so requires, we honor the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement to give prompt notice to the employer." *Zipes v. Transworld Airlines, Inc.*, 455 U.S. 385, 398 (1982). "It is clear that the running of the statute of limitations may be tolled by equitable considerations." *Callowhill v. Allen-Sherman-Hoff Co.*, 45 FEP Cases 222,225 (3d Cir. 1987); *Kazanzas v. Walt Disney World Co.*, 704 F.2d 1527, 1529 (11th Cir. *cert. den.*, 464 U.S. 982 (1983).

In order to determine if tolling is acceptable the court has identified several factors for consideration; whether

the employee had actual or constructive notice of the requirements; employee's diligence once the requirements were made known to him; whether the employer was prejudiced by the delay.

Tolling the statute of limitations creates no potential for unfair surprise or unjust delay to the petitioners. The Court will find and evidence will indicate that the petitioners not only encouraged the respondent to pursue his claim internally with their EO but also participated in substantial documentation, responsive and/or settlement negotiations with both DFEH and EEOC.

However, equitable tolling will be applied where plaintiff is wrongfully induced by the employer to forego his right to commence suit, the period of deceit will not be charged against the limitations period. See *Monnig v. Kennecott Corp.*, 603 F. Supp. 1035 (D.Conn. 1985) which recognized that equitable tolling applied to plaintiffs since the defendants allegedly gave them reason to believe they would be retained. "An employee should not have to jeopardize his chance of being rehired by filing an age discrimination charge against his employer, if the employer encourages the employee to believe he will be rehired." *Franci v. Avco Corp.*, 538 F.Supp. 250, 254 (D. Conn. 1982).

ADEA (29 USCS sec. 621 et. seq.) is remedial, humanitarian legislation which should be liberally construed to effectuate congressional purpose of ending age discrimination in employment, *Jackson v. Alcan Sheet & Plate*, 462 F.Supp. 82 (N.D.N.Y. 1978).

B. Whether the period of time during which the EEOC negotiated the case tolled the statute of limitations under 29 U.S.C. Sec. 626(e)(2).

Where the claim arises from the willful discrimination of the employer, the limitations period is within three years of the discriminatory conduct. This period is tolled for up to one year during the time the EEOC attempts to obtain voluntary compliance with the Act, in no event for a period in excess of one year, 29 U.S.C. Sec. 626(e)(2), *Leite v. Kennecott Copper Corp.*, 558 F.Supp. 1170 (D. Mass. 1983).

Respondent asserts that his statute of limitations, due to the extensive efforts at conciliation by the EEOC did toll his limitations period for a year, and therefore, his complaint is timely. *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888 (5th Cir. 1970), *Miller v. Intern. Tel. & Tel. Corp.*, 755 F.2d 20 (2nd Cir. 1985).

III. THE NINTH CIRCUIT'S HOLDING IN THE CASE AT BAR DOES NOT DISREGARD RICKS AND CHARDON; BUT, IN FACT RECOGNIZES THAT EACH CASE MUST BE DECIDED ON ITS OWN MERITS AND THE ATTENDANT CIRCUMSTANCES.

A. The Bright Line Rule was established to protect employers from the need to defend against state discriminatory actions.

Respondent does not suggest that courts should require litigation of dilatory claims. However, where a plaintiff has been assertively pursuing his rights on a continuous basis since the beginning of the discriminatory treatment and where the exact date of dismissal is not

clear due to equivocal language in alleged termination notice, such a bright line does not exist.

Ricks was a simple case where the exact date of termination notice and impact, were uncontroverted. Only the proper date to begin the statute was in question. No representations were made that alternate employment with the College would be forthcoming. Again, in *Chardon,* a definite date of termination was established by specific notice to each affected employee. In the case at bar, such a bright line is not evident. Notices received by respondent were equivocal and illusory. And, ongoing assurances were made to him that alternate employment would be found. In fact, he was allowed to leave the drafting department still believing he would be called back. Where no bright line exists, *Ricks* will not and cannot apply.

B. Whether the statute of limitations should be tolled where discriminatory conduct is continuing?

Respondent asserts that petitioner did perpetuate discriminatory policies and practices based on age during and subsequent to respondent Addy's termination.

Respondent made repeated complaints to Petitioner's EO in 1980 that he was being subjected to discriminatory treatment due to his age and that the discriminatory treatment was continuing in nature.

Petitioners maintained several age-based discriminatory policies both written and unwritten. One policy involved rating employees over 65 on a different scale than those under 65. Petitioners admitted that they had an unwritten policy to "carry" older employees, despite their performance until they reached age 65. Petitioners had

forced at least one other employee to retire prior to respondent at age 65 due to poor ratings but had rehired him when he filed a complaint. It is clear that once an employee reached 65 and refused to retire, the company would change the standards they had previously deemed acceptable and then institute disciplinary procedures against said employees for not meeting the "new" acceptable standards. (CR 40, TAB 9, p. 615; CR 40A, TAB 24, p. 758).

Further, Respondent submitted on August 12, 1980 documentation including a notice of intent to work beyond the age of 65 to his employer (at the direction of the EO officer) (CR 40 TAB CR 40A, subtab 23, p. 743). This written "discriminatory practice" (CR 40, TAB CR 40A, subtab 23, p. 744 and 745) prompted petitioner's transmittal slip, dated 8-14, regarding petitioners request to continue working which was directed (pursuant to written company policy) to respondent's superviser and the vice president of the company. The aforementioned indicates a written policy of age discrimination still in effect on August 14, 1980, six months after another employee had filed a complaint regarding this policy. Therefore, petitioners maintained written and unwritten discriminatory policies despite their being made aware of the illegality of such practice by an earlier complaint filed by another employee which was resolved by DFEH.

Respondent further alleges that this policy of discrimination and forced retirement or subsequent termination did continue in existence after his termination until at least December 1982, when petitioner "constructively discharged" another employee.

The Court in *E.E.O.C. v. Home Insurance Co.*, 553 F.Supp. 704 (S.D.N.Y. 1982), citing *Guardians Assn. v.*

Civil Serv. Commission, 633 F.2d 232 (2d Cir. 1980); *Morelock v. NCR Corp.,* 586 F.2d 1096 (6th Cir. 1978), *cert. den.* 441 U.S. 906 (1979) held that "It is well established that an unlawful discriminatory policy maintained by an employer constitutes a continuing violation for the purposes of limitations, in the sense of a discriminatory condition of employment as the term is used in age discrimination—a suit against maintenance of the mandatory retirement policy would be timely so long as the provision was maintained at least into the applicable limitations period."

The Court in *Thurman v. City of Torrington,* 595 F.Supp. 1521 (D.Conn. 1984), held that the plaintiff must typically point to facts outside his own case to support his allegation of a policy on the part of defendent. Respondent refers the Court to another employee, Evelyn McConnell, age 63, who complained of age discrimination and sexual harrassment by petitioners and filed a complaint with DFEH in July 1982 clearly indicating that petitioners were still implementing similar discriminatory practices and policies after the termination of respondent (connected case below).

The court in *Home Insurance Co., supra,* held that "Where employer maintained discriminatory mandatory retirement provisions timeliness of claim asserting unlawful termination thereunder was to be determined with reference to the earlier of either the last day of employment or the date which the employer eliminated the unlawful provisions, because employer maintained the alleged unlawful policy throughout the termination being sued upon. relevant dates for each employee was his date of termination."

Further, the court notes that for statute of limitations purposes, "We must assume that the lowered retirement age, continued unequivocally in effect until some time after the employees were terminated, continued in effect indefinitely regardless of the knowledge which hindsight affords us of the subsequent changes."

Appellant asserts that the statute of limitations surrounding continual violations begins to run at the end of the continual period or is tolled during the pendency of the violations. *United Airline Inc. v. Evans,* 431 U.S. 555 (1971); *Franks v. Bowman Transportation Co.,* 424 U.S. 747 (1976); *Ward v. Caulk,* 650 F.2d 1144 (9th Cir. 1981); *Amador Val. Investors v. City of Livermore,* 43 Cal. App. 3d 483, 117 Cal. Rptr. 749 (1974); *Laffey v. Northwest Airlines,* 567 F.2d 429 (D.C. Cir. 1976) *cert. den.* 434 U.S. 1086 (1978).

Therefore, the statute of limitations would be tolled until petitioners were in compliance with the laws on discrimination due to age not only on paper but in their actual application. Respondent contends that the statute should be tolled at least until December 1982 upon the constuctive discharge of another employee who worked for the same petitioners, experienced similar discriminatory practices, or at the very least the effective date of his termination. *Jennings v. Home Insurance,* 635 F.2d 310 (4th Cir. 1980).

C. Whether the Summary Judgment is appropriate where triable issues of fact are present.

Respondent does not deny the importance of summary judgment as a means of handling cases where the evidence is undisputed and so one-sided that one party must pre-

vail as a matter of law. However, where genuine issues of material fact exist, summary judgment is not an appropriate remedy. Petitioners assert that a clear and convincing standard of proof should be evident in order to withstand summary judgment citing, *Anderson v. Liberty Lobby, Inc.*, 91 L.Ed.2d 202, 216 (1986). The Court went further to state:

> It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . .

Respondent here argues that in addition to substantial evidence that petitioners intentionally plotted to discharge Addy and misled him into believing he was only being reassigned, the inferences from the documentation regarding the state of mind of the parties—both the intent of petitioners and the reasonable understanding of these representations by respondent—are jury questions, not suitable for disposition by summary judgment. The Ninth Circuit decision in this case does not block the availability of summary judgment in all cases but, rather, indicates that where substantial questions of fact as to when a reasonable man should know he is terminated becomes a jury issue and summary judgment is inappropriate. Among the disputed facts are the date of definite termination, the willful intent of the employer, the bad faith conspiring of the company with their independent EO officers, the quality of the employee's work, and whether the employee was dismissed due to age or for legitimate business reasons.

1. What is the appropriate time to begin the statute of limitations where notice is equivocal and employer's discriminatory actions continued until the date of last service?

There is ongoing controversy over how extensive the application of *Ricks*, a Title VII case, to ADEA claims should be. ADEA is considered a remedial statute which should be liberally construed. *Bonham v. Dresser Industries, Inc.*, 569 F.2d 187 (3d Cir. 1977) *cert. den.* 439 U.S. 821 (1978). The *Bonham* court explained, "Circumstances may exist where, notwithstanding plaintiff's failure to comply with the letter of the law, the purposes of the statutory requirement—providing the Secretary of Labor with an opportunity to conciliate while the complaint is fresh and giving early notice to the employer of possible litigation have been substantially served. In *Naton v. Bank of California*, 649 F.2d 691 (9th Cir. 1981), the court noted that the rationales of *Ricks* and *Bonham v. Dresser* may produce different results when the employee's last day of service is different from the date on which the employer gives unequivocal notice of termination. The Court in *Elliott v. Group Medical and Surgical Service*, 714 F.2d 556 (5th Cir. 1983) specifically found the question of when the employment relationship ceased, where it is not clearly established, to be a jury issue. See also *Aronson v. Crown Zellerbach*, 662 F.2d 584 (9th Cir. 1981), *cert. den.* 103 S.Ct. 1183 (1983).

In the instant case, no clearly defined date of termination is present. Only an equivocal disciplinary memorandum was presented to respondent on December 17, 1980. A second, similarly worded memorandum was given to

Addy on March 20, 1987. Respondent had no reason to believe that he was dismissed because of ongoing and uncontroverted statements by the EO that another suitable position would be found for him within the company. Petitioner has not produced any evidence that they did not make these ongoing representations to the plaintiff and were continuing to do so until his last day of work.

Further, where ongoing violations are committed by an employer, determining the correct date for starting the statute of limitations, has been found to be a jury question. Cases where (like *Ricks*) notice is deemed to be the date of notice include a definite date of termination. *Cf. Vershuuren v. Equitable Life Assur. Soc'y,* 554 F.Supp. 1188 (SDNY 1983) where plaintiff was given notice that he would be terminated on September 1 unless another position were found for him. The court distinguished this from *Ricks* stating the issues arising in the context of a statute of limitations question differ from those in the context of a pleading question; further, if *Ricks* did apply, the June 8 notice was not a final notice when it held out the possibility of continued employment.

In the case at bar, petitioners had gone to even greater lengths to make the respondent believe that an acceptable position would be found by continuing to make these representations repeatedly and documents, produced through discovery, show that representations were in fact made to respondent that the EO had and would continue to seek alternate employment for him and for him not to worry. (CR 40, TAB 4, p. 531-535; CR 40, TAB 9, p. 599)

Petitioners would have the court believe that respondent did not meet the requirements of his position. Re-

spondent can show that he worked up to required employment standards and even attempted to respond to the new demands made on him during his last year. By petitioner's own documentation, respondent's attitude improved during the period of time he was under scrutiny (CR 40, p.608-683); plaintiff has records which prove he was working at the same level as other employees and, indeed, exceeding the quality of their work. Respondent has received multiple commendations for the work he has accomplished and has produced witnesses whose depositions directly challenge Petitioners claims that his work was unacceptable. (CR 40A, TAB 27, p. 728,882; CR 40A, TAB 29, p. 803-811.)

2. Whether or not the employer's actions were willful, therefore extending the statute of limitations to three years, is also a jury question rendering the case inappropriate for Summary Judgment.

"By pointing to evidence which calls into question the defendant's intent, the plaintiff raises an issue of material fact which, if genuine, is sufficient to preclude summary judgment." *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 393,899 (3d Cir. 1987).

The court in *Marshall v. Westinghouse Electric Corp.*, 576 F.2d 588 (5th Cir. 1978), *reh'g den.* 582 F.2d 1042 (5th Cir. 1978) held that fact finding is necessary on the question of willfulness, therefore, summary judgment is unavailable. See also, *Collins v. Manufacturers Hanover Trust Co.*, 542 F.Supp. 663 (S.D.N.Y. 1982); *Marshall v. Hills Bros.*, 432 F.Supp. 1320 (N.D. Cal. 1977).

3. Was Respondent dismissed in violation of ADEA or for legitimate business reasons?

Petitioner must be able to show that respondent was dismissed for a legitimate business necessity such as quantity or quality of production requirements. 29 U.S.C. sec. 623(f)(1).

Respondent here has shown that discriminatory treatment based on age by petitioners was an integral part of his dismissal. Respondent consistently received fair to good performance reviews during his tenure with petitioner until the year he turned 65. Around the same time, he had informed petitioners that he would be continuing his employment past the age of 65. Addy was then submitted to a new "trial period" during which he was placed under strict scrutiny. Such scrutiny was part of petitioners age-based policy to alter the acceptable performance rating for employees after 65 to above fair while prior to 65 an acceptable rating is fair or below, (CR 40, TAB 9 pp. 61-63, 606-624). Respondent was subjected to this stricter level of review than other, younger members of his department—a clear violation of ADEA, *Blum v. Witco Chemical Corp.*, 829 F.2d 363 (3d Cir. 1987).

Additionally, information garnered after the decision to dismiss an employee are strongly suspect. Performance appraisals setting forth in writing a supervisor's evaluation of the discharged employee, based on definite and valid criteria, have been held important for purposes of considering questions of good cause for dismissal, but appraisals written after the decision to fire has been made have been discounted as self-serving. *Schulz v. Hickok Mfg. Co.*, 358 F.Supp. 1208 (D.C. Ga. 1973). Petitioners should

have known of any poor work performance or other problems with respondent from previous months, if indeed his performance was poor. A new probationary period based on age should not have been necessary unless the decision to dismiss was made earlier and documentation of same was necessary before the petitioner could attempt to dismiss for cause. (CR 40 pp. 614 & 616).

Further, petitioners have testified that they had been carrying respondent for a period of time, waiting until he reached the age of 65 and would be retired. If this is true, then petitioners, by their own admission, assert that age was the determining factor here and not the level of the performance. (CR 40, TAB 9, p. 615; CR 40A, TAB 24, p. 758).

Increased scrutiny itself was strictly age-based. If an additional period were acceptable, the adequacy of performance should have been based on the same level of scrutiny as that of all other employees. A policy where an increased level of scrutiny which is strictly instituted based on the age of the party must be immediately suspect. *Blum,* supra; see also *Reynolds v. CLP Corp.,* 812 F.2d 671 (11th Cir. 1987).

A mixed motivation case arises when either the employer concedes that age was a discernible, though not a motivating factor or a court finds the presence of such a factor. The employer bears the burden of demonstrating by a preponderance of the evidence that the same adverse employment decision would have been made even without age being considered. *Mullins v. Uniroyal, Inc.,* 805 F.2d 307 (8th Cir. 1986). General claims that this decision was inevitable because of performance not age but at the same

time states that they had been carrying plaintiff for several years with unsatisfactory work production, despite adequate performance evaluations, until such time as respondent approached his 65th birthday and expressed his desire to continue to work. At that time, he was suddenly under extreme scrutiny. Defendent's statement that other older employees have been retained is irrelevant. Ongoing employment of other older employees does not effectively rebut the presumption of age as a determining factor in dismissal. *Smith v. World Book-Childcraft,* 502 F.Supp. 96 (N.D.Ill. 1980); *Loeb v. Textron, Inc.,* 600 F.2d 1003, 1014 (1st Cir. 1979); *Douglas v. Anderson,* 656 F.2d 528, (9th Cir. 1981) in dicta. Indeed here it should not eliminate the question as to petitioners intentional violations, especially since, in the Graphic Arts Dept. where respondent was employed, only the younger members of the staff remain. The two oldest employees, both covered by the ADEA, were dismissed by their supervisor, petitioner Bowser. Petitioners would lead the court to believe that Ms. Bowser was approaching retirement herself by describing her to be of "mature years" while she in fact is several years younger than respondent.

Some circuits require only that age be a determining factor to show a prima facie case, shifting the burden, to defendent to show other cause for dismissal. *Laugesen v. Anaconda Co.,* 510 F.2d 307 (6th Cir. 1975), *Cova v. Coca-Cola Bottling Co.,* 574 F.2d 958, 959 (8th Cir. 1978). Others require that it be proven by preponderence of evidence before the burden shifts. *Loeb v. Textron, Inc.,* 600 F.2d 1003, 1011-12 (1st Cir. 1979). Either way, in this case, the burden was shifted to defendent to prove age was not the determining factor and that other legitimate business rea-

sons were the reason for termination. If GTE could show a legitimate business reason for his termination, then the burden shifts under *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973) to the plaintiff to show that defendent employers reasons were merely pretextual.

Respondents assert that petitioners have not met their burden to show dismissal was not pretextual and willfully executed as part of an ongoing policy of age discrimination.

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CONCLUSION

The Ninth Circuit Court of Appeal was required to render a well-reasoned decision on the various issues before it at the time of respondent's appeal. It did so.

Based on the foregoing, Respondent respectfully requests that the petition for *writ of certiorari* be denied.

Dated: January 4, 1988

Respectfully submitted,

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